No. 02-469

FILED
24
FEB 24 2003
CLERK

In The
Supreme Court of the United States

THE BLACK & DECKER DISABILITY PLAN,

Petitioner,

v.

KENNETH L. NORD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Disability Plan

Petition For Certiorari Filed September 19, 2002
Certiorari Granted January 10, 2003

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45pp

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General Docket
US Court of Appeals for the Ninth Circuit

4/27/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS is past due; CADS must be filed no later than 5/4/00 for Lawrence Rohlfing; appellant's designation of RT is due 4/24/00; appellee's designation of RT is due 5/2/00; appellant shall order transcript by 5/12/00; court reporter shall file transcript in DC by 6/12/00; certificate of record shall be filed by 6/19/00; appellant's opening brief is due 7/31/00; appellees' brief is due 8/28/00; appellants' reply brief is due 9/11/00; [00-56689] (rmw)
6/1/00	Filed Lawrence D. Rohlfing for Aplt Civil Appeals Docketing Statement served on 5/30/00 (to CONFATT) [00-55689] [00-55689] (kkw)
6/21/00	Filed order (deputy Clerk: bsp/CONFATT) this case is under consideration for inclusion in the Mediation Program. A settlement assessment conference will be held by telephone on 7/10/00 at 2:00 p.m. PACIFIC (San Francisco) Time. The briefing schedule previously set by the court remains in effect. [00-55689] (jr)
6/26/00	Received copy of transcript designation and ordering form filed in DC (set to case file) (sm)
7/11/00	Filed certificate of record on appeal RT filed in DC 6/23/00 [00-55689] (pg)
7/12/00	Filed order CONFATT (LJE) Case not selected for program. Counsel interested in obtaining settlement assistance or program information should contact mediation office in SF. Counsel are requested to serve copies of this order on

their clients. Briefing schedule set forth in the court's order filed 4/27/00 shall remain in effect. [00-55689] (em)

7/31/00 14 day oral extension by phone of time to file brief. [00-55689] appellants' brief due 8/14/00; appellees' brief due 9/13/00; the optional reply brief is due 14 days . . . (king)

8/16/00 Filed original and 15 copies Appellant Kenneth L. Nord opening brief (Informal: n) 54 pages and five excerpts of record in 1 volume; served on 8/14/00 (note: requested counsel to amend the letter informing aple of new briefing schedule) [00-55689] (em)

8/23/00 Received Lawrence D. Rohlfing for Appellant Kenneth L. Nord letter dated 8/21/00 re: amending letter showing new briefing schedule. CASE FILE [00-55689] (em)

9/12/00 14 day oral extension by phone of time to file Appellee The Black & Decker's brief. [00-55689] appellees' brief due 9/27/00; appellants' reply brief due 14 days . . . (jlc)

9/28/00 Filed original and 15 copies appellee The Black & Decker's 19 pages brief, 1 supp Exc. vol; served on 9/27/00 [00-55689] (em)

10/12/00 14 day oral extension by phone of time to file 's [sic] reply brief. [00-55689] appellants' reply brief due 10/30/00; (king)

11/1/00 Filed original and 15 copies Kenneth L. Nord reply brief, (Informal: n) 21 pages; served on 10/30/00 [00-55689] (gar)

6/22/01 Calendar check performed [00-55689] (aw)

7/17/01 Calendar materials being prepared. [00-55689] [00-55689] (mw)

7/25/01 CALENDARED: Pasadena October 16, 2001 9:00 a.m. Courtroom 3 [00-55689] (mw)

9/18/01 FILED CERTIFIED RECORD ON APPEAL IN 4 VOLS. (TOTAL): 2 CLERKS REC 1 RTs and one dkt #21 (Original) [00-55689] (kym)

10/12/01 Filed order (Betty B. FLETCHER, Dorothy W. NELSON, M. M. MCKEOWN,): The parties should be prepared to discuss Regular v. Delta Family Care Disability Survivors Plan, 98-55853, Slip Op. 1t 13479 filed 9/24/01 at oral argument. (phoned aple, faxed aplt) [00-55689] (em)

10/16/01 ARGUED AND SUBMITTED TO Betty B. FLETCHER, Dorothy W. NELSON, M. M. MCKEOWN. [00-55689] (bg)

12/20/01 Rec'd notice of change of address from Lee T. Paterson and Amanda C. Sommerfeld for appellee The Black & Decker; served on 12/19/01. [00-55689] (hh)

7/15/02 FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Betty B. FLETCHER, author; Dorothy W. NELSON; M. M. McKEOWN.) FILED AND ENTERED JUDGMENT. [00-55689] (em)

7/22/02 Filed Appellant Kenneth L. Nord bill of costs, served on 7/19/02 ($628.80) [00-55689] (em)

7/29/02 Filed Lawrence D. Rohlfing's motion for attorney(s)' fees in the amount of $18,154.00; served on 7/26/02 (to Moatt 8/12/02) (em)

8/6/02	MANDATE ISSUED; COSTS TAXED FOR $628.80 [00-55689] (em)
8/23/02	Filed order MOATT (ME) Aplt's unopposed mtn for aty fees is granted in the amount of $18,154.00. [00-55689] (kkw)
9/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-469 filed on 9/24/02. [00-55689] (em)
1/31/03	Received notice from Supreme Court, petition for certiorari GRANTED on 1/10/03. Supreme Court No. 02-469 (hh)

U.S. District Court
Central District of California (Western Div.)

1/14/99	1	COMPLAINT filed Summons(es) issued referred to Discovery Carolyn Turchin (jp) [Entry date 01/19/99]
2/3/99	2	Standing ORDER by Judge Carlos R. Moreno (tw) [Entry date 02/08/99]
2/4/99	3	Proof of service of SC executed upon defendant Black & Decker on 2/3/99 svd Charles E Fentz, Sr Vice President & General Cnsl by mail (jc) [Entry date 02/09/99]
2/4/99	3	NOTICE AND ACKNOWLEDGEMENT of receipt of summons and complaint by defendant Black & Decker on 1/21/99 received by Charles E Fentz, Sr Vice President & General Cnsl (jc) [Entry date 02/09/99]
3/22/99	4	ANSWER filed by defendant Black & Decker to complaint [1-1] (tw) [Entry date 03/23/99]
3/23/99	5	MINUTES: The crt is in rcpt of dfts ans. The initials CM stand for Judge Carlos Moreno & not Judge Marshall. Please correct your file since it delays pldgs in getting to the right Judge. by Judge Carlos R. Moreno CR: n/a (tw) [Entry date 03/26/99]
7/23/99	6	MINUTES: osc re dism for lack of prosecution; plf is ord to show cause in writing no later than 8/15/99 why actn sh not be dism. Crt will consider the filing of joint rpt of early meeting as appropriate resp to this osc. by Judge Carlos R. Moreno CR: n/a (tw) [Entry date 07/26/99]

8/30/99	7	ORDER of dism by Judge Carlos R. Moreno. The crt ords that this actn be of hereby is dism w/o prej for lack of prosecution & failure to comply wi ords of the crt. terminating case (MD JS-6). (ENT 9/1/99), mld ntcs. (tw) [Entry date 09/01/99]
9/2/99	8	JOINT REPORT OF EARLY MEETING OF COUNSEL filed. Estimated length of trial 2 days (jag) [Entry date 09/03/99]
9/3/99	9	NOTICE OF MOTION AND MOTION by plaintiff Kenneth L Nord for relief from ord of dismissal & response to OSC; motion hearing set for 9:00 9/27/99; Decl of Lawrence D Rohlfing (jag) [Entry date 09/09/99]
9/27/99	10	ORDER by Judge Carlos R. Moreno vacating order of dism [7-1], [7-2], & discharging OSC Nunc Pro Tunc to 8/15/99. Case Reopened (MD JS-5). (ENT 9/28/99), mld ntcs. (tw) [Entry date 09/28/99]
12/10/99	11	MINUTES:; mandatory status & Sched conference set on 10:00 1/10/00 by Judge Carlos R. Moreno CR: n/a (tw) [Entry date 12/14/99]
1/10/00	12	ATTORNEY SUBSTITUTION: terminating attorney Amanda C Sommerfeld for Black & Decker, attorney Lee T Paterson for Black & Decker by defendant Black & Decker and substituting attorney Lee T Paterson by Judge Carlos R. Moreno (tw) [Entry date 01/12/00]
1/10/00	13	MINUTES: Mandatory status conf; mandatory status conference held; trial set on 9:00 3/28/00. Mot hrg cutoff 2/7/00, 9:00 by

		Judge Carlos R. Moreno CR: Deborah Gackle (tw) [Entry date 01/13/00]
1/18/00	14	NOTICE OF MOTION AND MOTION by plaintiff Kenneth L Nord for summary judgment; motion hearing set for 9:00 2/7/00 Lodged stmt of facts, order (tw) [Entry date 01/20/00]
1/18/00	15	Indexes of clm file by plaintiff Kenneth L Nord (tw) [Entry date 01/20/00]
1/18/00	16	DECLARATION of Freeman Leeth by plaintiff Kenneth L Nord in suppt of motion for summary judgment [14-1] (tw) [Entry date 01/20/00]
1/25/00	17	STIPULATION and ORDER by Judge Carlos R. Moreno to cont hearing on motion for summary judgment [14-1] 9:00 2/28/00 (tw) [Entry date 01/26/00]
2/7/00	18	DECLARATION of Raymond J. Brusca by defendant (ir) [Entry date 02/08/00]
2/7/00	19	NOTICE OF MOTION AND MOTION by defendant Black & Decker for summary judgment, or alt for summary adjudication; motion hearing set for 9:00 2/28/00 Lodged p/o, stmt (tw) [Entry date 02/08/00]
2/7/00	20	MEMORANDUM of PA IN SUPPORT by defendant Black & Decker of motion for summary judgment [19-1], motion for summary adjudication [19-2] (tw) [Entry date 02/08/00]
2/7/00	21	DECLARATION of Lawrence D. Rohlfing by plaintiff Kenneth L Nord in suppt of motion for summary judgment [14-1] (tw) [Entry date 02/08/00]

2/7/00 22 DECLARATION of AMANDA C. SOMMERFELD by defendant Black & Decker (yl) [Entry date 02/08/00]

2/14/00 23 STATEMENT of material facts by plaintiff Kenneth L Nord in opp to dfts motion for summary judgment [19-1], motion for summary adjudication [19-2] (tw) [Entry date 02/16/00]

2/14/00 24 OPPOSITION by plaintiff Kenneth L Nord to motion for summary judgment [19-1], motion for summary adjudication [19-2] (tw) [Entry date 02/16/00]

2/14/00 25 OBJECTIONS by plaintiff Kenneth L Nord to the decal of Raymond Bruca [18-1] (tw) [Entry date 02/16/00]

2/14/00 26 Memo of PA in OPPOSITION by defendant Black & Decker to motion for summary judgment [14-1] (tw) [Entry date 02/16/00]

2/14/00 27 OBJECTIONS by defendant Black & Decker to decls of Freeman Leeth & Lawrence D. Rohlfing [21-1], [16-1] (tw) [Entry date 02/16/00]

2/14/00 28 Separate STATEMENT of genuine issues by defendant Black & Decker in suppt of motion for summary judgment [14-1] (tw) [Entry date 02/16/00]

2/14/00 29 ORIGINAL SIGNATURE PAGE re declaration of Raymond J. Brusca filed 2/7/00 [18-1] by defendant Black & Decker (tw) [Entry date 02/16/00]

2/18/00 30 REPLY memo of PA by defendant Black & Decker in suppt of dfts motion for summary

judgment [19-1], motion for summary adjudication [19-2] (tw) [Entry date 02/24/00]

2/25/00 31 REPLY by plaintiff Kenneth L Nord in suppt of his motion for summary judgment [14-1], & in opp to dfts motion for summary judgment [19-1] (tw) [Entry date 02/29/00]

2/28/00 32 MINUTES: Plfs mot for sum jgm, Dfts mot for sum jgm; Crts tentative ruling is to gr dfts mot, as the crt finds that plf has not met burden as to abuse by dft. Crt abides by its decision & gr dfts mot provisionally. Crt will issue ord re above stated ruing [sic] after fur reflection of oral arguments made. by Judge Carlos R. Moreno CR: Deborah Gackle (tw) [Entry date 02/29/00]

3/22/00 33 ORDER by Judge Carlos R. Moreno granting dfts motion for summary judgment [19-1], granting motion for summary adjudication [19-2], denying plfs motion for summary judgment [14-1]. (ENT 3/23/00), mld ntcs. (tw) [Entry date 03/23/00]

3/22/00 34 JUDGMENT AND ORDER: by Judge Carlos R. Moreno against plaintiff Kenneth L Nord. It is ord that plf sh take nothing by his cmp & that all plfs causes of actn agnst dft alleged therein are dism wi prj. terminating case (MD JS-6). (ENT 3/23/00), mld ntcs. (tw) [Entry date 03/23/00]

4/12/00 35 NOTICE OF APPEAL by plaintiff Kenneth L Nord to 9th C/A from Dist. Court jgm ent 3/23/2000 [34-2] (cc: Lawrence D. Rohlfing, Winston & Strawn) Fee: Paid (dl)

5/5/00	36	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [35-1] 00-55689 (ghap)
6/1/00	37	TRANSCRIPT DESIGNATION and ordering form for dates: 2/28/00 CR: Debra Gackle (ghap) [Entry date 06/05/00]
6/23/00	38	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 2/28/00 (Re: [35-1]) CR: Deborah Gackle (weap) [Entry date 06/27/00]
6/23/00	–	TRANSCRIPT filed for proceedings held on 2/28/00 (weap) [Entry date 06/27/00]
7/10/00	39	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (weap)
12/12/01	–	PLACED IN FILE – NOT USED re prop order on motion for sumjgm. (yc) [Entry date 01/02/02]
12/12/01	–	PLACED IN FILE – NOT USED stmm of uncontroverted facts and conclusions of law. (yc) [Entry date 01/02/02]
12/20/01	40	NOTICE of change of addr by cnsl by defendant Black & Decker (yc) [Entry date 12/21/01]
8/9/02	–	LODGED CC 9th CCA Jgm of said dist Crt in this cause is rv. (FWD TO CRD) 00-55689 (dl) [Entry date 08/14/02]
8/13/02	41	NOTICE OF REASSIGNMENT Of Case Upon rcpt of Mandate Frm The Ninth Circuit Crt of Appeals. Case randomly reassgned to Judge Terry J. Hatter for all fur procdngs. Case no. now reads as CV 99-408

TJH (CTx) (cc: all counsel) (rn) [Entry date 08/15/02]

8/13/02	–	CASE REOPENED – Purs to Ntc of Reassignment of Case Upon Receipt of Mandate fr the 9th. Cir Court of Appeals (rn) [Entry date 08/15/02]
8/19/02	42	NOTICE OF HEARING: Please take notice that the judgment of the US Court of Appeals for the Ninth Circuit having been rcd in this actn, the mtr of filing & spreading of said judgment is placed on cal for 9/16/02 at 10:00 am bef the Honorable Terry J Hatter, US District Judge, in Courtroom No. 17; It will be necessary for all cnsl to be present by Judge Terry J. Hatter; CR: (n/a) (nhac) [Entry date 08/21/02]
8/26/02	43	ORDER FROM USCA applnt's unopposed mot for atty fees is GR in the amount of $18,154.00. (00-55689) (ghap) [Entry date 09/03/02]
8/27/02	48	RECORD on appeal returned from U.S. Court of Appeals vols: 2; transcripts: 1; Brown folders: 1, doc# 21. (cbr) [Entry date 09/25/02]
9/5/02	44	NOTICE OF MOTION AND MOTION by Kenneth L Nord for attorney fees; PA; decl of Lawrence D Rohlfing; motion hearing set for 10:00 9/30/02 (lc) [Entry date 09/06/02]
9/16/02	45	CERTIFIED COPY of Appellate Court Order: reversing decision of the district Court [Appeal [35-1]; costs raxed on appeal in amt of $628.80 for Kenneth L Nord & agnst Black & Decker Disability Plan (lc) [Entry date 09/18/02] [Edit date 09/18/02]

9/16/02 46 MINUTES: MANDATE from Circuit Court of Appeals reversing decision of USDC & reflecting costs taxed in amt of $628.00 for prevailing pty be fld & spread on rec of this crt (lc) [Entry date 09/18/02]

9/17/02 47 STIPULATION and ORDER by Judge Terry J. Hatter cont hearing on plf motion for attorney fees [44-1] 10/7/02; if dft files timely petition for certiorari w/Supreme Crt from decision of 9th Circuit Crt of Appeals that the matter may be stayed on the filing w/district crt & svc of ntc of filing of petition for certiorari (lc) [Entry date 09/18/02]

11/13/02 49 ORDER by Judge Terry J. Hatter granting plf motion for attorney fees; dft shall pay plf reasonable atty fees of $16,450.00 [44-1] (vacated by 1/8/03 order) (lc) [Entry date 11/14/02] [Edit date 01/09/03]

12/13/02 50 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 9/16/02 (Re:) CR: Cynthia Mizell (weap) [Entry date 12/16/02]

12/13/02 – TRANSCRIPT filed for proceedings held on 9/16/02 (weap) [Entry date 12/16/02]

1/8/03 51 STIPULATION and ORDER by Judge Terry J. Hatter vacating 11/12/02 order re attorneys fees [49-1] (lc) [Entry date 01/09/03]

MetLife®

January 12, 1998

Met DisAbility
PO Box 3017
Utica, NY 13504

Kenneth Nord
16219 Orange Avenue
Paramount, CA 97023

RE: Disability Benefits
Claim No.: 679801078347
S. S. No.: 502-58-8111
Group No.: 36663
Black & Decker Corp

Dear Mr. Nord:

We are writing in regards to your claim for Disability Benefits.

In order to properly evaluate your claim, we require your physician(s) to provide us with following information:

1. A copy of all office notes which relate to this disability.
2. Current treatment plan; to include medication and dosages and your physical response to treatment.
3. Copies of all lab and diagnostic lab reports i.e.: MRI, CT Scans, X-Rays, etc.
4. Copies of physical therapy progress notes.
5. The enclosed Physician Report of Physical Capacity, completed in its entirety.

In addition, we have enclosed an 'Authorization To Furnish Medical Information" form, a 'Consent For Release Of Information' form and Personal Profile Evaluation form. We ask that you complete and return the enclosed forms. An envelope has been provided for your convenience.

Please note: This information should be submitted within thirty days. Also, the cost for providing this information is the claimant's responsibility.

Sincerely,

Jacqueline White
Case Management Specialist
Met DisAbility
(800) 300-4296

cc: Ray Brusca

PHYSICAL CAPACITIES EVALUATION

NAME OF CLAIMAINT Kenneth Nord SSN 502-58-1030

IMPORTANT: PLEASE COMPLETE THE FOLLOWING ITEMS BASED ON YOUR CLINICAL EVALUATION OF THE CLAIMANT AND OTHER TESTING RESULTS. ANY ITEM THAT YOU DO NOT BELIEVE YOU CAN ANSWER SHOULD BE MARKED N/A (NOT ANSWERABLE)

NOTE: In terms of an 8 hour workday. "Occasionally" equals 1% to 33%; "Frequently," 34% to 66%; "Continuously," 67% to

I. *In an 8-hr. workday, claimant can:* (*Circle full capacity for each activity*)

TOTAL AT ONE TIME

A.) Sit	—	0	—	[1,]	2,	3,	4,	5,	6,	7,	8, (hrs.)
B.) Stand	—	0	—	1,	2,	3,	4,	5,	6,	7,	8, (hrs.)
C.) Walk	—	0	—	1,	2,	3,	4,	5,	6,	7,	8, (hrs.)

TOTAL DURING ENTIRE "8-HOUR" DAY

A.) Sit	—	0	—	[1,]	2,	3,	4,	5,	6,	7,	8, (hrs.)
B.) Stand	—	0	—	1,	2,	3,	4,	5,	6,	7,	8, (hrs.)
C.) Walk	—	0	—	1,	2,	3,	4,	5,	6,	7,	8, (hrs.)

II. *Claimant can lift:*

	NEVER	OCCASIONALLY	FREQUENTLY	CONTINUOUSLY
A.) Up to 5 lbs.	☐	☒	☐	☐
B.) 6-10 lbs.	☒	☐	☐	☐
C.) 11-20 lbs.	☒	☐	☐	☐
D.) 21-25 lbs.	☒	☐	☐	☐
E.) 26-50 lbs.	☒	☐	☐	☐
F.) 51-100 lbs.	☒	☐	☐	☐

III. *Claimant can carry:*

	NEVER	OCCASIONALLY	FREQUENTLY	CONTINUOUSLY
A.) Up to 5 lbs.	☐	☒	☐	☐
B.) 6-10 lbs.	☒	☐	☐	☐
C.) 11-20 lbs.	☒	☐	☐	☐
D.) 21-25 lbs.	☒	☐	☐	☐
E.) 26-50 lbs.	☒	☐	☐	☐
F.) 51-100 lbs.	☒	☐	☐	☐

IV. *Claimant can use hands for repetitive action such as:*

	SIMPLE GRASPING		PUSHING & PULLING OF ARM CONTROLS		FINE MANIPULATION	
A.) Right	☑ Yes	☐ No	☑ Yes	☐ No	☑ Yes	☐ No
B.) Left	☑ Yes	☐ No	☑ Yes	☐ No	☑ Yes	☐ No

V. *Claimant can use feet for repetitive movements as in pushing and pulling of leg controls:*

RIGHT		LEFT		BOTH	
☐ Yes	☑ No	☐ Yes	☑ No	☐ Yes	☑ No

VI. *Claimant is able to:*

	NOT AT ALL	OCCASIONALLY	FREQUENTLY	CONTINUOUSLY
A.) Bend	☐	☑	☐	☐
B.) Squat	☐	☑	☐	☐
C.) Crawl	☐	☑	☐	☐
D.) Climb	☐	☑	☐	☐
E.) Reach	☐	☑	☐	☐

VII. *Restriction of activities involving:*

	NONE	MILD	MODERATE	TOTAL
A.) Unprotected heights	☒	☐	☐	☐
B.) Being around moving machinery	☒	☐	☐	☐
C.) Exposure to marked changes in temperature & humidity	☐	☒	☐	☐
D.) Driving automotive equipment	☒	☐	☐	☐
E.) Exposure to dust, fumes & gases	☒	☐	☐	☐

REMARKS ON ABOVE OR OTHER FUNCTIONAL LIMITATIONS.

SIGNATURE — DR. /s/ Lytton Williams

PRINT — NAME Lytton Williams M.D.

DATE 4/2/98

BEST AVAILABLE COPY

LAW OFFICES OF
LAWRENCE D. ROHLFING
12631 EAST IMPERIAL HIGHWAY, SUITE C-115
SANTA FE SPRINGS, CALIFORNIA 90670

LAWRENCE D. ROHLFING

MARC V. KALAGIAN
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YOUNG C. CHO
BRIAN C. SHAPIRO

TELEPHONE
(562) 868-5886
FACSIMILE
(562) 868-5491

April 21, 1998

Group Claims Review
Metropolitan Life Insurance Company
Post Office Box 6146
Utica, New York 13504

RE: Kenneth Nord
SSN: 502-58-1030
Claim No.: 679801078347

Dear Group Claims Review:

This letter follows up on my correspondence to you of March 25, 1998. At that time, I invoked and confirmed the review previously initiated by Kenneth Nord. I requested further explanation of the specific reasons for denial, requested identification of the information necessary to perfect the claim, requested in [sic] a copy of all pertinent portions of your claim file, and requested in [sic] opportunity to review and analyze the policy of insurance covering the plan.

Since writing to you at that time, I have secured additional information. I enclose a statement of physical capacity from Dr. Hartman April 9, 1998. Dr. Hartman

states that Kenneth Nord has an extremely limited capacity for sitting, can only lift up to five pounds occasionally, cannot use the lower extremities, and can only occasionally bend, squat, crawl, climb, or reach. In addition to the physical therapy evaluation, I enclose the complete records secured from Dr. Hartman. These documents reflect ongoing treatment for a disabling back condition. You will note that Dr. Hartman is the primary physician and not the orthopedist. The records do contain an MRI study dated August 1, 1997, indicating the presence of degenerative disc disease at L4-5 and L5-S1 with disc desiccation. Dr. Hartman has consistently expressed the opinion that Kenneth Nord is not able to work both on August 13, 1997, and on March 23, 1998, at both levels.

I have also secured an estimate of physical capacity from Dr. Williams. He expresses the same opinions, clarifying that the limitation in lifting includes carrying. That capacity evaluation is dated April 2, 1998. Included in the records of Dr. Hartman referenced above, are reports from Dr. Williams to Dr. Hartman. On January 23, 1998, Dr. Williams noted the presence of decreased range of motion and muscle spasm. I will secure and present the complete records from Dr. Williams, including his chart notes.

Thank you for your attention and cooperation. Should you wish to discuss the matter telephonically, please do not hesitate to call me.

Very truly yours,

/s/ Lawrence D. Rohlfing (kh)
Lawrence D. Rohlfing
Attorney for Kenneth Nord

LDR:sk

cc: Kenneth Nord

Enclosures

May 7, 1998

MetLife
5950 Airport Road
PO Box 6146
Utica, New York 13504

Law Offices of
Lawrence D Rohlfing
12631 East Imperial
Highway, Suite C-115
Santa Fe Springs, CA 90670

RE:
Long Term Disability
SS No: 502-58-1030
Group No: 36663
Claim No: 679801078347
Claimant: Kenneth Nord

Dear Mr. Rohlfing

We have received your correspondence dated April 21, 1998 and the additional medical records on Mr. Nord in regard to his Long Term Disability claim.

Please be advised we are reviewing this information along with all the other information on file. As soon as a determination is made, you will be advised accordingly.

Sincerely,

/s/ Kim Ferguson
Kim Ferguson
Senior Case Management Specialist
Met DisAbility
(800) 300-4296

LAW OFFICES OF
LAWRENCE D. ROHLFING
12631 EAST IMPERIAL HIGHWAY, SUITE C-115
SANTA FE SPRINGS, CALIFORNIA 90670

LAWRENCE D. ROHLFING
———————
MARC V. KALAGIAN
DENISE L. BOURGEOIS
YOUNG C. CHO
BRIAN C. SHAPIRO

TELEPHONE
(562) 868-5886
FACSIMILE
(562) 868-5491

June 19, 1998

Jacqueline White
Disability Claims Manager
Metropolitan Life Insurance Company
Post Office Box 3017
Utica, New York 13504

RE: Kenneth Nord
Claim No.: 679801078347
SSN: 502-58-1030
Employer: Black & Decker Corp.

Dear Ms. White:

Thank you for your letter of April 21, 1997. I'm experiencing some difficulty in getting a copy of the long-term disability plan from Black & Decker. I have gotten every other plan that they have but not the long-term disability plan. I expect to receive it shortly.

I did receive some additional records from Dr. Williams. Enclosed are the results of the discogram conducted on March 26, 1998. Please note the positive findings of concordant pain. This should provide you with a better basis for allowing the claim than previously presented.

I have also had the opportunity to review the records that you sent. The charge notes confirm the presence of low back pain, positive signs, and need for ongoing treatment. Kenneth Nord has positive electrodiagnostic studies to confirm the neurological involvement. He also has disc desiccation. Kenneth Nord has used a variety of pain, anti-inflammatory, and other medications for his severe orthopedic condition. Even as of January 15, 1998, Kenneth Nord could not even serve on a jury.

At this juncture, I am confused as to why metropolitan denied the claim for benefits. It is apparent to me that Kenneth Nord suffers from a severe orthopedic condition resulting in an inability to engage in either prolonged sitting or prolonged weightbearing, both required of substantial work activity. Please advise.

Thank you for your attention and cooperation. Should you wish to discuss the matter telephonically, please do not hesitate to call me.

Very truly yours,

/s/ Lawrence D. Rohlfing (kh)
Lawrence D. Rohlfing
Attorney for Kenneth Nord

LDR:sk

cc: Kenneth Nord

June 22, 1998

MetLife
Met Disability
5950 Airport Road
PO Box 3017
Oriskany, NY 13424

Kenneth Nord
16219 Orange Ave.
Paramount, CA 90723

Firm: Black & Decker
Group No.: 36663
Employee I.D. No.: 502-58-1030

RE: T.C. Prentice, M.D. Consultant In: Neurology
Address: 11525 Brookside Ave.
Suite 400
Downey, CA 90241

Appointment Date: 7/17/98 Time: 12:15 PM
Telephone No.: (781) 272-6612

Dear Mr. Nord:

In accordance with the terms of your Group Plan, we have requested the above-named physician to examine you as our Consultant on the appointment date and time shown above.

The reason for this examination is that we would like to have an independent evaluation of your condition to help us in the administration of your claim. Please understand, that we are not, in any way, questioning the integrity or ability of your own physician.

Please confirm your appointment of July 17, 1998 by telephone (781) 272-6612, as soon [sic] you receive this letter.

In addition, please give the physician your telephone number so that you can be contacted in the event it becomes necessary to change your appointment date. If a different appointment is schedule, please advise us of the new date. If for any reason, you are unable to keep your appointment, please notify the doctor's office at least 48 hours before the appointment and also *telephone our office (800) 300-4296 advising why you cannot keep this appointment.*

Please bring to this examination any x-rays, medical reports or test results regarding your disability.

Yours truly

Kim Ferguson
Case Management Specialist
Met DisAbility
1-800-300-4296 ext. 2478

LAW OFFICES OF
LAWRENCE D. ROHLFING
12631 EAST IMPERIAL HIGHWAY, SUITE C-115
SANTA FE SPRINGS, CALIFORNIA 90670

LAWRENCE D. ROHLFING

MARC V. KALAGIAN
DENISE L. BOURGEOIS
YOUNG C. CHO
BRIAN C. SHAPIRO

TELEPHONE
(562) 868-5886
FACSIMILE
(562) 868-5491

August 6, 1998

Kim Ferguson
Disability Claims
Metropolitan Life Insurance Company
Post Office Box 3017
Utica, New York 13504

RE: Kenneth Nord
Claim No.: 679801078347
SSN: 502-58-1030
Employer: Black and Decker Corp.

Dear Ms. Ferguson:

This letter will serve to inquire as to the status of the above matter. I wrote to Jacqueline White on June 19, 1998. I provided additional records at that time. I have also been advised that on that date you set an evaluation of Kenneth Nord with Dr. Prentice for July 17, 1998.

I would appreciate a response to my letter of June 19. I would also like to have in [sic] opportunity to review, analyze, and comment upon the report of Dr. Prentice. I have also now received a copy of the pertinent plan document.

Like many policies, this one carries two different definition [sic] of total disability dependent upon the time

frame at issue. The issue in this case deals with the own occupation definition of disability. Kenneth Nord ceased work on July 15, 1997. We are just now 12 months beyond the onset of disability.

Kenneth Nord worked for Black & Decker as a material planner. He lifted between 25 and 60 pounds. He spent slightly less than half the day standing and walking and the rest of the time sitting. According to the employer statement, lifting never exceeded 20 pounds and even then only on an occasional basis. The work does require a maintenance of the head and neck in a static position for up to 2 hours in a day and the same frequency for looking up and looking down.

Kenneth Nord does suffer from degenerative disc disease at L4-5 and L5-S1 with disc desiccation. MRI study dated July 30, 1997. Kenneth Nord has received consistent treatment from Dr. Hartman for back pain since his cessation of work activity. In fact, the medical records in your claim file demonstrate that Kenneth Nord received significant treatment and made his best effort to continue to work despite the presence of back pain prior to July 15, 1997. On January 15, 1998, Stanley Katz, MD stated that Kenneth Nord could not serve on a jury for three months because of the pain. Obviously, sitting on a jury has less physical strain than the job of a material handler for Black & Decker.

Kenneth Nord has had physical therapy and a broad array of medication. Electrodiagnostic studies of the lower extremities demonstrate the existence of nerve impingement. Although filed, both the EMG and the nerve conduction studies or abnormal suggestive of radiculopathy. Please remember in this regard that the employer has

stated that the work as material handler requires continuous interpersonal relationships and frequent exposure to job stress. It is difficult to imagine an individual in significant pain with radiculopathy having the prolonged and sustained capacity to function in that environment.

Pain can be both exertional and nonexertional. It also depends on the focus of the work activity. Even if we assume for the sake of argument that Kenneth Nord could perform the physical requirements of his work, the question becomes whether the pain would significantly interfere with his capacity to engage in the mental requirements of that work. The pain was so significant that Kenneth Nord could not sit on a jury, hear testimony, and make an informed decision. I am quite certain that Black & Decker would insist on the same degree of mental precision in the carrying out of the functions of a material handler.

This discussion is entirely consistent with the discogram ordered by Dr. Williams. The discogram demonstrated concordant pain after injection at L4-5 and L5-S1. The CT scan of the lumbar line revealed annular thinning of the intervertebral discs and loss of disc space at both levels. These studies in conjunction with the electrodiagnostic studies provide an objective basis for the conclusion that Kenneth Nord suffers from a pain syndrome that would interfere with his capacity to engage in the mental requirements of work.

I want to clarify these issues with the employer and with the current treating physician. I will supplement the record once I have had the opportunity to review and comment upon the opinion of Dr. Prentice. Please expedite

your transmittal of that report so that I can do my job as well.

Thank you for your attention and cooperation. Should you wish to discuss the matter telephonically, please do not hesitate to call me.

Very truly yours,

/s/ Lawrence D. Rohlfing (kh)
Lawrence D. Rohlfing
Attorney at Law

LDR:sk

cc: Kenneth Nord

October 15, 1998

MetLife
5950 Airport Road
PO Box 6146
Utica, New York 13504

Ray Brusca
Vice President of Benefits
Black & Decker Corp.
TW 170
701 East Joppa Road
Towson, MD 21286

RE:
Long Term Disability
Claim No: 679801078347
Group No: 36663
SS No: 502-58-1030
Claimant: Kenneth Nord

Dear Mr. Brusca

We have completed a review of Mr. Nord's Long Term Disability claim.

Based on this medical information in our possession, we find he does not meet the definition of disability as denied in your Group Plan. Therefore, we recommend the previous denial of benefits be upheld.

A copy of all the information considered is attached for your review.

The attached draft reply for your consideration is based upon our understanding of your plan and how the claim under consideration relates to that plan. As claims fiduciary, you must inform the claimant (or his representative) of your final decision in this matter. Please advise this office of your decision with a copy of your letter.

Yours Truly,

/s/ Kim Ferguson
Kim Ferguson
Senior Case Management Specialist
Met Disability
(800) 300-4296 ext 2478

DRAFT

October 15, 1998

Law Offices of
Lawrence D Rohlfing
12631 East Imperial
Highway, Suite C-115
Santa Fe Springs, CA 90670

RE:
Long Term Disability
Claim No: 679801078347
Group No: 36663
SS No: 502-58-1030
Claimant: Kenneth Nord
Black & Decker

Dear Mr. Rohlfing

We have completed the full and fair review of the denial of Mr. Nord's Long Term Disability claim. For the reasons noted below, it is our determination that the denial of your claim was proper and we therefore must uphold the denial decision.

As previously indicated to you, the Black and Decker Disability Plan defines disability as "the complete inability of a Participant to engage in his regular occupation with the employer during the first thirty months of disability, and beginning with the thirty-first month of disability, the Participant's complete inability to engage in any gainful occupation or employment with any employer for which the Employee is, as of his disability date, reasonably qualified by education, experience or training."

We have thoroughly reviewed all the medical and vocational information in our possession. Mr. Nord's date last work [sic] as a material handler was July 15, 1997 due to a diagnosis of degenerative disk disease and chronic low back pain.

Mr. Nord's attending physician Dr. Williams provided restrictions dated April 7, 1998. He indicated Mr. Nord

could sit for one hour during an 8 hour day, lift and carry up to 5 pounds occasionally, can use his hands, but not his feet for repetitive movements and can bend, squat, crawl, climb and reach occasionally. Another attending physician, Dr. Leo Hartman also provided restrictions. Dr. Hartman indicated on April 9, 1998 the same restrictions as Dr. Williams.

An X-ray dated March 10, 1997 of the hips and pelvis were negative. The lumbosacral spine x-ray of the same day revealed no evidence of acute process, mild degenerative changes of lower lumbar spine and mild degenerative disc disease at L4-L5-S1. An MRI dated July 30, 1997 of the lumbar spine revealed degenerative disc disease at L4-L5-S1 with disc desiccation and mild diffused bulge. There was no disc herniation, neural foramina or central canal stenosis. An EMG/NCS dated November 17, 1997 documents abnormal examination suggestive of mild bilateral L5 radiculopathy.

Mr. Nord attended an independent medical examination with Dr. Antoine Mitri on July 17, 1998. It was Dr. Mitri's opinion that Mr. Nord's [sic] does present with degenerative disk disease and chronic myofascial pain syndrome, however his general and neurological examination are essentially normal. The tests performed essentially show no evidence of lumbosacral nerve root compression, even though the EMG and NCS showed bilateral L5 radiculopathy, this was stated to be mild and were not confirmed by the LS MRI that did not show root compression.

This examination report was forwarded to your office on August 7, 1998 and September 15, 1998 asking that you provide Mr. Nord's attending physician with a copy and

provide his comment. To date, we have not received a response.

Based on our review, the medical supports Mr. Nord's ability to return to work at his own occupation, therefore, he can not be considered totally disabled as defined by his Group Plan.

This determination is the final decision on review and constitutes completion of the full and fair review required by Mr. Nord's Plan and federal law.

Should you wish to pursue this matter further, you should consult the information provided concerning his rights, as set forth in his Summary Plan Description ("SPD"). A copy of the SPD may be obtained by contacting the Human Resource or Personnel Division of Mr. Nord's employer.

Please be advised that under the provisions of his Plan, no further administrative appeals are available to him concerning his disability benefit.

KWIKSET CORPORATION

JOB DESCRIPTION

Job Code: KX016 Grade: XX 3

First Level Mgmt	Date	Compensation	Date
Second Level Mgmt	Date	Human Resources	Date

TITLE: Material Planner

LOCATION: Anaheim or Bristow

REPORTS TO: Materials Manager

SUPERVISES: None

WORKING RELATIONSHIPS: Inventory Control Clerks, Material Control Expeditor, Inventory Control Specialists, Production Schedulers.

SUMMARY: The Material Control Specialist controls and maintains inventory levels by ordering goods and interacting with vendors using spreadsheets.

MAJOR DUTIES AND RESPONSIBILITIES (ESSENTIAL FUNCTIONS):

1. Interacts with vendors on a daily basis in order to ensure prompt and correct delivery of goods ordered. Works with vendors to resolve any shipping and order problems.
2. Controls inventory ordered and ensures goods are purchased at reduced costs. Maintains adequate supply of goods in stock, ordering when necessary.
3. Purchases sufficient quantity of goods and supplies staying within budgetary limits and storage capacity.

4. Generates spreadsheet to determine appropriate levels of inventory. Determines inventory level needed based upon production plans.

TITLE: Material Control Specialist

5. For physical/psychological requirements and working conditions see form HR 612-20.

ADDITIONAL DUTIES AND RESPONSIBILITIES:

Other duties as required by supervisor.

EMPLOYEE SPECIFICATIONS:

Bachelor's degree or equivalent. Position requires knowledge of MRP and MPS which is typically obtained through 5 years of related experiences. Knowledge of Harvard Graphics and spreadsheets is also required.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE CARLOS R. MORENO,
UNITED STATES DISTRICT JUDGE

KENNETH L. NORD, PLAINTIFF,	)	
VS.	)	CV 99-0408 CM
THE BLACK & DECKER DISABILITY PLAN, DEFENDANT.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, FEBRUARY 28, 2000

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DEBORAH K. GACKLE, CSR, RPR
Official Court Reporter
U.S. District Court
312 North Spring Street
Room 402-A
Los Angeles, CA 90012

[2] **APPEARANCES:**

FOR THE PLAINTIFF:

LAW OFFICES OF LAWRENCE ROHLFING
BY: LAWRENCE ROHLFING
12631 East Imperial Highway
Suite C115
Santa Fe Springs, California 90670

FOR THE DEFENDANT:

WINSTON & STRAWN
BY: LEE T. PATERSON
444 South Flower Street
Los Angeles, California 90071-2911

[3] LOS ANGELES, CALIFORNIA; MONDAY, FEBRUARY 28, 2000; 9:25 A.M.

THE CLERK: Item No. 1, civil, 99-0408, Kenneth L. Nord versus The Black & Decker Disability Plan.

Counsel, please state your appearances for the Court.

MR. PATERSON: Good morning, Your Honor. My name is Lee Paterson for Black & Decker.

THE COURT: Good morning.

MR. ROHLFING: Good morning, Your Honor. Lawrence Rohlfing on behalf of the plaintiff, Kenneth Nord.

THE COURT: Good morning.

Matter is here also on a cross-motion for summary judgment, and the Court has read and considered the

motions. I'll announce my tentative, and I'll entertain argument.

My tentative is to grant the defendant's motion and deny plaintiff's motion. First, on the – however, on the issue of exhaustion of administrative remedies, to the extent that defendant raises that as a defense, that part of the motion is denied.

I think, given the plan documents and the provision for internal appeal, that the plaintiff is correct in his claim that all the appropriate admistrative [sic] remedies were exhausted.

To the extent that there's any ambiguity in whether or not the remedies were exhausted internally, I think that [4] ambiguity should be interpreted in favor of the plaintiff.

However, as to the balance of the issues raised, I'm going to rule in favor of the defendant. To the extent that there is an apparent conflict of interest, it doesn't appear that that apparent conflict of interest had any material effect on the ultimate decision.

So applying a less deferential standard of abuse of discretion, and in reviewing the merits of the case, I don't believe at this time that plaintiff has really sustained its burden to show that there was any abuse by the plan.

The two things that are pointed out: The analysis or the opinion of the human resources evaluator, I think, one, that is insufficient, and, second, there's nothing about the IME that creates any question as to whether or not there was anything inappropriate or a misanalysis of the plaintiff's condition.

So those are my tentative comments. I'll have more. So I'll hear first from counsel for Mr. Nord.

MR. ROHLFING: Thank you, Your Honor.

With respect to the conflict-of-interest issue, and also with respect to the opinion of Ms. Forward in her statement under penalty of perjury abut the impact of paying, the record is clear that is before the court that Mr. Brusca made his decision not based upon Dr. Mitri's report in conjunction with Ms. Forward's statements under penalty of perjury, he added something else to the mix, and that something else to the mix is [5] still not before the court. That is the statement of Ms. Forward in a telephone conversation with Mr. Brusca.

And so Black & Decker has put both Mr. Nord and the Court in a situation of trying to guess what is inside of a black box and saying, "Well, we know two-thirds of it goes into the black box, and we know all of it comes out of the black box. And so in the broad scheme of things, it appears that it's reasonable."

Well, Your Honor, I would hope that you would reconsider that because full and fair review has to be fair. It's not a game of five-card stud where the plan gets to hold one card face down and never disclose it.

Even now, even now as we stand here in court, we do not know the substance of the conversation that Mr. Brusca had with Ms. Forward. He has stated that he relied on that statement, and still, in his declaration, refuses to disclose it.

Your Honor, I would submit to you that is ample evidence, in light of Tremain, for you to conclude that the

apparent abuse of – the apparent conflict of interest has affected the decision-making process.

Black & Decker has made a decision within the plan. The final decision does not cite this conversation. We still don't know what the conversation is.

Black & Decker is hiding something, and Your Honor should not countenance Black & Decker's failure to disclose all [6] of the material evidence because the failure to disclose robs the decision-making process of the earmarks of being fair. And that's required by the statute and also required by the regulations.

With respect to Dr. Mitri's opinion – and I think this is fairly well set out in the brief – Dr. Mitri found that Mr. Nord suffers from a myofacial pain syndrome, and the question is one of magnitude. And Dr. Mitri is not clear about the magnitude of pain.

The 9th Circuit in other areas of law has been very clear that pain can be both nonexertional and exertional. There are Penny v. Sullivan, Perminter v. Heckler, there's Desrosiers v. Secretary.

In all of those cases, the 9th Circuit has clearly stated that pain can be exertional, it can interfere with an individual's ability to engage in the physical requirements of work.

And in this case, according to Dr. Ebeling and Dr. Mitri, Kenneth Nord is limited to sedentary work. That is a pretty significant limitation on his ability to engage in physical activity.

Dr. Mitri's also stated that he suffers from a pain syndrome. And we know from the employer's statement

that Ms. Forward filled out at the beginning of the claim, that this is a job that requires intense interpersonal communications.

[7] And I would submit to Your Honor that it doesn't make sense that an individual that is suffering from a chronic myofacial pain syndrome, that is occasionally resorting to Darvocet, that is occasionally resorting to other narcotic medication, could be expected to, on a continuous basis, deal with the stress, to deal with the interpersonal communication requirements of the job of a material planner; and that is exactly what Ms. Forward endorsed on her statement.

And so we have the treating physician opinions that answer the question, we have Dr. Mitri's opinion that is, at best, ambiguous on the frequency and intensity of the pain, and we have Ms. Forward saying, assuming that it's occasionally moderate, which I think is a pretty low level of threshold of pain, he can't perform his usual and customary job.

I would submit, Your Honor, that Mr. Nord has sustained his burden of proof. He did submit the evidence necessary to prove that he could not do his usual and customary job to the plan, and for the plan to rely on extra record evidence is inexcuseable.

THE COURT: Let me hear from Black & Decker.

MR. PATERSON: Yes, Your Honor.

The difficulty with the plaintiff's argument to you is that in both cases, he ignores the fact that the plaintiff was using drugs, legal drugs, to control his pain.

In the first case, the plaintiff submitted a incomplete [8] hypothetical to Ms. Forward, asked her could – would he – could he do work which required interpersonal relationships, intense interpersonal relationships, if he was under pain.

Didn't ask him the question, which he should have asked him, could he control that pain by using drugs, and, therefore, not have a problem with these intense interpersonal relationships.

Got the answer no, and then brought that document to this Court and asked this Court to consider an incomplete hypothetical as proof of the fact that the employee couldn't do the job.

It's clearly not proof of the fact that the employee can't do the job. The employee has been prescribed drugs. Those drugs are to control the pain.

Purpose of controlling the pain is so that the employee can perform his job and live his life, clearly what he is doing in this case. That is what Mr. Brusca took into account.

Mr. Brusca first made his decision without considering the human resource administrator's decision at all. He was then asked to reconsider his decision based on this incomplete hypothetical.

He reconsiders his decision, he did talk to Ms. Foreman [sic], and he didn't change his opinion. Since that incomplete hypothetical is not admissible in this case – at least we argue it's not admissible in this case – it makes no [9] difference whether he revealed what Ms. Foreman said to him or not. It's –

THE REPORTER: Can you please slow down.

THE COURT: Slow down.

MR. PATERSON: Yes. I'm very sorry.

It's [sic] makes no difference whether – what Ms. Foreman said to him or didn't say to him because the hypothetical is improper.

Same argument, same – similar situation in regard to Dr. Mitri's opinion. Dr. Mitri made an opinion that he has periodic pain and that he is capable of performing a sedentary job, that that job does periodically require certain kinds of physical and intellectual stimulation.

Dr. Mitri doesn't opine as to whether that intellectual stimulation or physical stimulation would be affected at all by the fact that he cuold [sic] take a drug to relieve the pain or relieve himself of the symptoms of that pain.

And, therefore, again, plaintiff ignores the fact that the plaintiff has been given prescriptions for drugs to control the pain so he can engage in a useful life.

Mr. Brusca obviously took that into effect and properly denied the claim and under a substantial evidence test should not be reviewed by this Court again. Thank you.

THE COURT: You can reply briefly.

MR. ROHLFING: Your Honor, there are disability cases; [10] there are disability policies; there are thousands of disability cases pending in this court and in the 9th Circuit and every other court in this country for one reason: Because medicine is not 100 percent effective.

And for Mr. Nord to take narcotic pain medication and to simply – imply that that – that instantly he would have the ability to engage in the full-blown mental requirements of intense interpersonal communications in dealing in stressful situations I think is, at best, naive.

If an individual has a chronic pain syndrome and he just starts to develop the occasional moderate pain that is assumed in the hypothetical question that's posed to Ms. Forward and takes the narcotic medication, it isn't reasonable to assume that he would then be able to continue in the intense interpersonal communications and dealing with the stressful situations that the employer's stated is required of this job. He has to have – you have to have some reasonable amount of time for the medication to take effect.

And the important factor to consider with respect to this new allegation in court that the hypothetical question to Ms. Forward was incomplete, is that the regulations require that the plan administrator advise Mr. Nord of any additional evidence that is necessary to perfect his claim.

And I think that that carries with it a compounded view to advise Mr. Nord, We don't think that this evidence is quite [11] enough. You haven't included the medication issue.

There is an issue of side effects, there is an issue of time it takes the pain medication to take hold and what the residual capacity for the mental requirements of work Mr. Nord would have, both with the onset of moderate pain and the use of narcotic medication.

And it goes back to full and fair review. The administrative proceedings are not adversarial. The plan is required to assist the claimant for benefits in perfecting his claim, and the plan didn't do that here. Thank you.

THE COURT: Anything further?

MR. PATERSON: No, Your Honor.

THE COURT: I'll take counsel's arguments under submission. I think I'm going to go ahead with my tentative, but I just want to reflect a little bit more on one particular issue of the conversation between Brusca and the human resources evaluator.

MR. ROHLFING: Thank you, Your Honor.

MR. PATERSON: Thank you, Your Honor.

(Proceedings concluded at 10:38 a.m.)

STATE OF CALIFORNIA

CV 99-0408 CM

COUNTY OF LOS ANGELES

I hereby certify that the foregoing matter, entitled KENNETH L. NORD versus BLACK & DECKER DISABILITY PLAN, is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

/s/ Deborah K. Gackle — June 20, 2000
Deborah K. Gackle — Date
CSR No. 7106